(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 863

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Plaintiff*,

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and Dr. N. ALFRED DIGGS, *Defendants*.

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

Page

TABLE OF CASES CITED.

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PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Julia Moore, respectfully shows:

I.

A Summary Statement of the Matter Involved. The Statute.

The case arises out of the filing of an interpleader by an insurance company when there are conflicting claims for the proceeds of a life insurance policy and the deposit of the proceeds of the policy in the registry of the United States District Court until the rightful claimant has been determined by the Court.

THE ISSUES.

The issues may be stated as follows:

St. Clark Moore was a Pullman porter and was insured by the Prudential Insurance Company under group life insurance policies G 4149 and A 39 issued by the Prudential Life Insurance Company of America to the Pullman Company. Two policies of insurance were issued, dated June 18, 1942, each for the sum of $2100.00 and payable to Julia Moore, wife of the insured, upon death of insured; G 4149 for death from natural causes and A 39 for death by accidental means. The insured was injured on August 6, 1942 and died on August 14, 1942.

Ionia Moore and Julia Moore claimed the insurance as beneficiaries. Ionia Moore claimed the insurance as beneficiary, by virtue of a purported change of beneficiary made on August 10, 1942 (Tr. 2-7).

The Prudential Insurance Company of America filed an interpleader in the district court because Ionia Moore was a resident of Atlanta, Georgia, and Julia Moore was a resident of Chicago, Illinois. The proceeds of the two policies amounting to $4200.00 was deposited in the registry

of the district court and the case was tried before the Honorable William J. Campbell of the District Court without a jury.

Both claimants were, of course, named defendant, and the issues were raised on the pleadings between them, the facts of which will more fully appear hereafter. The trial court declared that the beneficiary was changed from his wife, Julia Moore to his mother, Ionia Moore and ordered the insurance money paid to Ionia Moore (Tr. 124).

St. Clark signed an authorization for a change of beneficiary to Ionia Moore, on August 10, 1942 (Tr. 50), the Pullman Company received the authorization and delivered it to the Pullman Company, who sent it to the Prudential Insurance Company of America (insurer)

St. Clark Moore died on August 14, 1942, and on August 15, 1942 the Prudential Insurance Company of America acknowledged receipt of the change of beneficiary and attached the acknowledgment to the policy (Tr. 122).

The provision in the policies prescribing the manner in which the beneficiary may be changed reads as follows:

> "The beneficiary may be changed in accordance with the terms of the policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the employer. *Such change shall take effect after the acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former beneficiaries shall thereupon cease.*" (Tr. 23.)

The Trial Judge held that the change of beneficiary was completed when the insurer attached receipt of the change of beneficiary to the policy.

The Court of Appeals upheld the trial Judge and declared that petitioner was divested of her rights because she shot the insured. The trial Judge ruled that all evidence proving the shooting and cause of death of the insured was inadmissible.

CONTESTED ISSUES.

I.

Can the Court of Appeals make a finding of fact based upon matters not in issue and excluded from the evidence, reform the contract, and estop petitioner from asserting her rights under the contract?

II.

Will the non-performance of a ministerial act by the insurance company render the change of beneficiary invalid?

III.

Does the court have power to change the terms of the contract, by substitution of attachment of acknowledgment of the change of beneficiary to the policy, in lieu of delivery of the acknowledgment to the insured as the policy provides?

IV.

Can the Court of Appeal find that the injury inflicted by petitioner prevented the acknowledgment of the change of beneficiary by the insurance company and caused the early death of the insured before the insurance company could deliver the acknowledgment to the insured

V.

Can the rights of the new beneficiary begin before the rights of the old beneficiary end?

VI.

Did the insured execute the request for a change of beneficiary of his own free will.

The Decisions Before.

Opinion of the United States Circuit Court of Appeals for the Seventh District dated November 13, 1944, appears at record 142.

The findings of fact and conclusions of law of the district court is at record 122.

A STATEMENT OF THE FACTS.

II.

St. Clark Moore and Julia Moore were living together when he was injured on August 6, 1942. He was taken to Provident Hospital and his wife, was taken into custody by the police, and held until August 10, 1942, when she was released and exonerated from all responsibility for his injury. She went to the hospital immediately and was told that she could not see her husband. The order that she could not see her husband was given by Dr. Diggs, one of the defendants herein, at the request of Roberta Wigington, a niece of respondent, who was personally acquainted with the Doctor. Petitioner asked the cousin for permission to see her husband and was refused such permission. She pleaded for a chance to see her husband believing that she could give him the incentive to fight to live. The cousin

answered that she would rather see him die than allow her to see him (Tr. 99).

All of the relatives of St. Clark Moore (except his wife and her relatives) were permitted by Dr. Diggs to visit him, and made repeated demands that he change the beneficiary of his insurance from his wife to his mother (Tr. 80). They made false statements about the wife while she was in the custody of the police for the purpose of poisoning his mind against her (Tr. 14). He yielded to their demands and signed requests for a change of beneficiary on August 10, 1942. The relatives of respondent also consulted Richard E. Westbrooks, a lawyer, also defendant herein, to ascertain (Tr. 15) how to proceed to have the beneficiary changed (Tr. 15). On August 7th, while the insured was unconscious and before she could talk to him, Roberta Wigington telephoned to the Pullman Company an drequested that a representative be sent to the hospital to obtain a change of beneficiary from him (Tr. 77).

Two relatives of the wife donated blood in an attempt to save his life, and they were also barred from seeing him. Relatives of the wife when refused admittance to the hospital (Tr. 90) became worried over his condition and requested his family physician, Dr. Clemons, to see him and ascertain his condition. The Doctor went to the hospital about one hour before the change of beneficiary was signed. St. Clark Moore knew the doctor, but did not recognize him and talked incoherently. He was delirious and his temperature was above normal (Tr. 95, 96).

A police officer also made several visits to the hospital for the purpose of interviewing him, but was unable to do so because he could not talk. He had tubes in his nose and was not given water or food until August 12, 1942 (Tr. 92). He rallied on August 12, 1942 and for the first time was given nourishment.

II.

Statement of the Basis of the Jurisdiction of this Court.

The jurisdiction of this court is confirmed by Paragraph B of Section 5 of Rule 38 of the Supreme Court, in words and figures as follows, to wit:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been,but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The decisions of the Courts below are reviewable under Rule 38, for the reason that the Courts below have decided an important question of law in conflict with applicable local decisions, and have so far departed from the accepted and usual course of judicial proceedings, that petitioner has been deprived of her right to a trial upon issues, determined by the Court of Appeals, and by reason thereof petitioner has been deprived of her rights in a contract of insurance.

The petitioner has complied with Section 2 of Rule 38 of the Supreme Court. The final judgment of the court below was entered on December 18, 1944.

III.

The Questions Submitted.

1.

Was Julia Moore divested of her rights as beneficiary named in the policy when the Prudential Insurance Company attached an acknowledgment of the receipt of the request for a change of beneficiary to Ionia Moore, the day after the death of the insured?

2.

Was the insured of sound mind and disposing memory and not subjected to undue influence when he signed the request for a change of beneficiary?

3.

Were the requirements of the change of beneficiary clause, for the protection of the insured or the insurer?

4.

Would the proceeds of the life insurance vest in petitioner upon the death of the insured?

5.

Was the delivery of the acknowledgment to the insured, a condition precedent to the change of beneficiary?

6.

Could the beneficiary be changed without performance by the insurance company of the terms of the contract?

7.

Can the Appellate Court find that petitioner shot the insured and caused his death and as a consequence estop petitioner from receiving the insurance as beneficiary?

8.

Was the cause of the injury of the insured in issue?

IV.

Reasons Relied Upon for the Allowance of a Writ of Certiorari.

I.

The decisions by the Courts below involve a question of great importance in the interpretation and construction of a contract of insurance.

II.

The decisions by the Courts below constitute judicial revision of a written contract.

III.

The decisions by the Courts below deprive petitioner of her rights contrary to the terms of the contract.

IV.

The decision of the Appellate Court estops petitioner from asserting her rights as provided in the contract.

V.

The Appellate Court based its decision on evidence declared by the Trial Court to be immaterial and irrelevant and petitioner is entitled to refute such evidence.

VI.

The plaintiff, The Prudential Life Insurance Company, declared that the insured was injured accidentally and paid Twent-one Hundred Dollars ($2100.00) on an accident insurance policy and respondent admitted the truth of such

allegation and seeks to recover the proceeds of said accident insurance. The Appellate Court held that said accident was caused or brought about by the act of petitioner and by reason of such act estopped petitioner from asserting her rights. The allegation of accidental injury and the admission by respondent is *res judicata* as to the accidental injury of the insured. The finding of fact by the Appellate Court that petitioner shot the insured is inconsistent with such allegation and admission of accidental injury and petitioner is entitled to prove that the injury of the insured was not caused by any fault or intent on her part.

VII.

The decision of the Appellate Court reverses the Trial Court and opens a new issue which must be tried.

VIII.

The rights of petitioner have been deprived petitioner without due process of law. The sanctity of contracts has been violated.

IX.

The Appellate Court used the doctrine of estoppel as an excuse for not enforcing the terms of the contract and such doctrine establishes a dangerous precedent, especially when it is not supported by evidence.

X.

The evidence in the record that petitioner shot her husband is hearsay and petitioner was denied the right to answer such evidence.

XI.

The decision of the Appellate Court is based upon matters not in issue in said cause.

XII.

The decision by the Appellate Court unlawfully deprives petitioner of her rights under the contract and at the same time convicts petitioner publicly of committing a murderous attack on her husband.

XIII.

The decision of the Court below is not based upon any decision applicable to the contract.

XIV.

The decisions by the Courts below are in conflict with applicable law decisions.

XV.

The decisions of the Courts below have so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

V.

Answer to new issues raised by the Circuit Court of Appeals.

The court of appeals denied petitioner's rights under the policy in the following language:

> "While we are justified in accepting as the Illinois law, the decision in *Sun Life Ass. Co.* v. *Williams*, 284 Ill. App. 222, we believe there is a further reason in the present case why we must recognize the insured's change in beneficiary. We refer to the fact that appellant's shooting insured prevented the consummation of the change of beneficiary. The injury thus inflicted resulted in his death. His early death alone prevented the acknowledgment of the change of beneficiary by the insurance company. It is immaterial whether the shooting was accidental or intentional. The consequences so far as affecting the insured's ability to

make a change of beneficiary, were the same. *Kavanagh* v. *New England M. L. Ins. Co.*, 238 Ill. App. 72.

'Then, too, such death made it impossible for the insurance company to notify the insured of its recognition of his change in beneficiary. *She is therefore estopped* from insisting on the literal compliance with terms of the policy because her act made compliance impossible of performance. That this reasoning finds support in the Illinois decisions and expresses Illinois Law on the subject, see *Kavanagh* v. *New England M. L. Ins. Co., supra.* The similarity in the two cases extends to the facts. There, as here, prevention of a change was brought about by the *wife's shooting the insured, and his early resulting death caused by said shooting.*''

The Court of Appeals held that petitioner could not question the failure of the insurer to perform the ministerial act of delivering the acknowledgment to the insured because she shot her husband.

Service of the acknowledgment was not held to be discretionary with the insurer, nor did the insurer refuse to serve the acknowledgement on the insured. In all of the decisions rendered in Illinois including the *Williams* case, the Court held that performance of a ministerial act by the insurer was essential to divest the original beneficiary of interest; that non-performance could not and did not divest the interest of the beneficiary sought to divested of interest.

The Court refused to vest the proceeds of the policy in the petitioner because it declared that she shot her husband and by reason thereof was not entitled to claim the insurance.

The Court failed to determine how the insurer could perform the ministerial act of delivering the acknowledgment

to the insured after his death. Instead the Court declared that the petitioner could not request a ruling on that point because she had forfeited her rights to the insurance.

The only interpretation that could be placed upon the decision of the Court of Appeals is that the insurance would have vested in petitioner when the insured died, if petitioner had not forfeited her rights by shooting the insured.

We are unable to reconcile the language of the Court with the contract. On page 8 of its opinion, the Court said that the requirement that the insurer serve the insured with the acknowledgment, was directory and not mandatory. The court having previously held that all action was stopped when the insurer learned of the death of the insured, does not hold that the insurer was not required to serve the insured with the acknowledgment.

The Court held that the death of the insured made it impossible for the insurer to notify the insured of the change of beneficiary and that petitioner caused his death and was therefore estopped from insisting on the literal compliance with the terms of the policy; that her act in shooting the insured made compliance by the insurer impossible.

The injury of the insured was not in issue. The Trial Judge ruled out all evidence showing how the insured was injured. His rulings were made on motion of respondent who did not want the evidence in the record for fear that the evidence would show that the insured absolved his wife from all responsibility for his injury immediately after the injury and while the facts were fresh in his mind.

Cross examination of John J. Leary, witness for Respondent:

"Q. Mr. Leary, did you talk to anyone to ascertain what Mr. Moore was suffering from and how—what the extent of his disability was, just how sick he had been prior to the time you arrived at the hospital?

A. Only, I asked him how he was. Why he wanted to make the change. He said, 'His wife shot him.' I wasn't there more than five minutes in that place. I had other places to go. It was a routine matter and I didn't delay.

Q. Did you know that shot was accidental?

A. I didn't know anything about the shooting.

Mr. Hanna: Objection.

Mr. Burroughs: Q. Did you know prior to the time you talked to Mr. Moore, he had made a statement that he was shot accidentally, that his wife wasn't responsible?

A. No, I don't know a thing about it.

Mr. Hanna: I object.

The Court: I don't see the materiality of it. Sustained.

Mr. Burroughs: The witness stated Mr. Moore stated he was shot. One of the allegations made in Counsel's pleading is that his wife shot him. I don't want the Court to think that this shooting was a result of her—

The Court: I am concerned with this insurance policy and the change of beneficiary. I don't care whether the shot was purposely or accidentally."

We are ready and willing to have the court inquire into the shooting. We have been ready at all times for an inquiry into the injury to St. Clark Moore. We were willing that such an inquiry be made. Julia Moore was not charged with murder or manslaughter. Why, then, should the Court of Appeals deny her of her rights upon the ground that she shot her husband? The least the court could do was to remand the case for the purpose of ascertaining whether St. Clark Moore was shot by his wife.

St. Clark Moore and his wife were on the best of terms when he was injured. They had no quarrels or disputes. They were not fighting or quarreling; they were not estranged or mad at each other; they were a happily married couple and she was a kind, indulgent wife.

St. Clark Moore did not accuse Julia Moore of shooting him, and he talked to a police officer before he went to the hospital.

The Trial Judge ruled that the only evidence to be heard or presented was the evidence concerning the execution of the change of beneficiary on August 10, 1942. We quote from the record the rulings of the Trial Judge.

Direct examination of Marie Sims, witness for Julia Moore (*Page* 88 *and* 89 *Record*):

"Q. While you were there, did you hear St. Clark Moore talk to anyone?

A. Yes, I did.

Q. Who was the conversation with?

A. He was talking to the police.

Q. Who was present when the conversation took place?

A. I was there and Mrs. Sanders and Miss Hardwick, Charles Hunt, John Logan; I think that was about all.

Q. Will you relate the conversation?

Mr. Hanna: Just a minute. If the court please, I object to that conversation as being out of the presence of my client, Ionia Moore; for the further reason, it has no bearing on what took place on the tenth day at the time of the change of beneficiary. That is what we are concerned with.

The Court: What is the purpose of the conversation, Mr. Burroughs?

Mr. Burroughs: To show, Your Honor, that insured after his injury had a friendly feeling for Julia Moore.

In other words, they claim that he changed his beneficiary because he was angry over the accidental shooting that took place on the sixth of August.

The Court: Well, I don't recall any testimony as to his motives for change at the last hearing.

Mr. Hanna: There wasn't any.

Mr. Burroughs: I think Robert testified something about he wanted to change the beneficiary because his wife had shot him. I may be wrong.

The Court: There is nothing before the Court. I have my summary of the evidence before me. Of course, I didn't take it down word for word as the reporters are doing. In my summaries, I see no evidence of the motive of the deceased for the change of the beneficiary. I do not know that is our concern in a matter of this kind. I am concerned with his state of mind at the time of the change. As to his motives I don't now if they are any of my concern.

Mr. Burroughs: Your Honor, I think John Weems said something to that effect in his testimony.

The Court: If he did, I didn't think it of sufficient importance to even write it down. I don't care what his motives were. I want to know if he was in his right mind when he did this.

Mr. Burroughs: Very well, then, I won't pursue that.

The Court: Very well. Objection sustained."

Certainly the conversation had with St. Clark Moore by the police officer immediately following the injury of St. Clark Moore was for the purpose of ascertaining how he was shot. Ionia Moore objected to that conversation and the Court sustained the objection.

Ionia Moore persisted in her successful efforts to bar all conversations taking place after the shooting. She withdrew her own question, asked her witness, John Weems, relating to a conversation had with St. Clark Moore, after

warning by the Court, that admission of evidence along that line would permit counsel for Julia Moore to explore all conversations taking place prior to August 10th.

Testimony of John Weems, witness for Ionia Moore, Rec. 81:

"Mr. Hanna: Q. Before that date when this was executed, before the 10th of August, did St. Clark Moore have a conversation with you about changing the beneficiary?

The Court: I am going to warn you, if you go further on this, I am going to permit them to cross-examine to the full extent on this.

Mr. Hanna: I guess you are right on that. I will withdraw it."

The trial Judge made the same ruling urged by Mr. Justice Major. He limited the evidence to the pleadings. He continued the same ruling throughout the trial. We quote further from the record.

Cross examination of Roberta Wigington (*Page* 1, *Record*), *witness for Ionia Moore*:

"Q. Do you know two sisters of Mrs. Julia Moore?

A. I don't know any of them. I have seen two of them.

Q. Did you see them in the hospital on August 8?

A. I saw them in the lobby of the hospital, but I don't know what day it was.

Q. And did you tell them at that time that they couldn't see St. Clark Moore?

Mr. Hanna: I object to that, as not being cross examination. This is on the 8th, and I confined myself to what happened in those few minutes on the 10th.

The Court: Sustained."

Re-direct examination of John Weems (*Page* 81, *Record*), *witness for Ionia Moore*:

"Mr. Hanna: Q. Before that date when this was

executed before the 20th of August, did St. Clark Moore have a conversation with you about changing the beneficiary?

The Court: I am going to warn you, if you go further on this, I am going to permit them to cross examine to the full extent on this.

Mr. Hanna: I guess you are right on that. I will withdraw it. The mother wasn't there. You don't need to call her. The only other witness is this nurse."

Direct examination of Dr. Diggs (*Page* 105, *Record*), *witness for Ionia Moore*:

"Mr. Burroughs: If the Court please, I sought to introduce in evidence the testimony of St. Clark Moore on the night of August 6, and the Court ruled that had no connection with the 10th of August, and I ask that the testimony of the doctor regarding the conversation with him on that night be stricken.

The Court: No, I did not. The motion is granted. The answer may be stricken.

Q. Can you give us an opinion based upon a reasonable degree of medical and surgical certainty, based upon your conversation there, what his medical condition was?

Mr. Burroughs: That is objected to, Your Honor.

The Court: Unless you bring it down closer to the 10th. We are concerned largely with the tenth. I sustained your objection to similar testimony prior to the tenth. I am concerned with his medical and physical condition on the morning of the tenth of August.

Mr. Hanna: Yes, sir, I will confine myself to that.

The Court: Very well."

We respectfully suggest that the case of *Kavanagh* v. *New England Mutual Life Insurance Company*, 238 Ill. App. 52, cited by the Court as the basis of the estoppel is distinguished from the facts in this case in that (1) the old beneficiary prevented the change of beneficiary from being endorsed on the policy by refusing to surrender the policy to the insurance company, (2) the reviewing court

ordered that the old beneficiary be allowed money loaned the insured, (3) the old beneficiary was accused of murdering the insured and was indicted for murder and tried in the Criminal Court, (4) the insured and the beneficiary were separated and the beneficiary carried a revolver to the office of the insured when the fatal shooting took place, (5) and the shooting of the insured was made an issue in the pleadings and evidence was introduced on that subject.

We respectfully call the Court's attention to the fact that the *Kavanagh* case and the case at bar are not similar as to facts; that in the *Kavanagh* case the shooting of the insured and his early death did not prevent the change of beneficiary from being completed; that the act of the estranged wife in refusing to deliver the insurance policy to the insurance company prevented the insurance company from indorsing the change on the policy.

We also call the Court's attention to the order of the Court striking the answer and counterclaim of Richard E. Westbrooks, who sought to make the injury of St. Clark Moore an issue and that the order to strike was made on motion of Ionia Moore. In her brief respondent objected to petitioner's reference to the answer and counterclaim of Richard E. Westbrooks because it was stricken. Ionia Moore had stricken from the pleadings all issues relating to the injury of St. Clark Moore and the Court of Appeals resurrected the issues stricken and drew its own inference for the benefit of respondent.

We respectfully suggest that Julia Moore is entitled to a re-trial and the submission of evidence in regard to how the insured was shot and to whether she shot him, as the court has held. She was never charged with shoot-

ing her husband. She was never tried for shooting him. She is entitled to the protection and not the condemnation of a court of equity. She is entitled to exoneration from the suspicion placed upon her by this court. She is entitled to her day in court. The doctrine of estoppel cannot apply.

Mr. Justice Major held that she is not estopped from asserting that no change of beneficiary was effected. He said that no such theory was advanced by the pleadings or otherwise, either in the court below or before this court, and that the theory is untenable under the circumstances.

Either the appeal court or the trial court erred. If this court is right, we have the right to offer evidence to show her innocence of the suspicion of shooting her husband. If the trial Judge is right, the finding of this court is in error and the entire case should be reconsidered without bias or prejudice against her and without estoppel of her rights on the ground of bringing about circumstances that made it impossible for plaintiff to comply with the terms of the policy.

Either the court should reverse the cause with instructions to permit her to introduce evidence showing how the injury of the insured occurred, or her rights as beneficiary should be considered by the court without reference of the injury of the insured. In either event, the decision of the court should be expunged from the records and the case retried by the trial judge and re-argued before the court.

We respectfully submit that Julia Moore has not had her day in court; she has a right to clear her good name and reputation; she has a right to be heard and if the

cause of the injury of the insured is an important fact to be considered by the court, the trial judge erred in refusing to allow evidence on that point and the cause must be remanded for further proceedings and evidence to determine whether Julia Moore shot her husband.

Wherefore, your petitioner prays that a Writ of Certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit Court, directing it to certify and send to this Court a transcript of the record and proceedings thereon, to wit and that this cause may be received and determined by this Court and for all other relief as may be proper.

Respectfully submitted,

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel,

Chicago, Illinois,
January 20, 1945.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Index precedes the petition for Certiorari.

The opinion of the Circuit Court below appears at record p. 43 and the findings of fact and conclusions of law of the district court, appear at our p. 53.

Grounds On Which the Jurisdiction of this Court is involved.

The basis of the jurisdiction of this court has been stated at page 7 of the preceding petition for Certiorari.

III.

Statement of the Case.

The facts are alleged at page 2 of the preceding petition for certiorari.

IV.

Specification of Errors.

Errors relied upon for reversal are set forth on page 4 of the preceding Petition for Certiorari under reasons relied upon for the allowance of a Writ of Certiorari and are supplemented with the following propositions of law and citations of cases.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

The proceeds of a life insurance policy vest in the beneficiary named therein at the time of the death of insured.

Gurnett v. *Mutual Life Ins. Co.*, 356 Ill. 612, 619.

Frick v. *Lewelleyn*, 298 Fed. 803.

Equitable Life Assurance Society v. *Stilley*, 271 Ill. App. 283.

Prudential Insurance Company of America v. *Fidelity Union Trust Company, as executor of the last will and testament of Robert Gemmell, deceased, and Armena B. Gemmell, defendants*, 102 N. J. Eq. 281.

Sullivan v. *Maroney*, 77 N. J. Eq. 565.

Anderson v. *Broadstreet Nat'l Bank*, 90 N. J. Eq. 78.

Farmer Coal and Supply Co. v. *Albright*, 90 N. J. Eq. (Vice-Chancellor Foster) 132.

Metropolitan Life Ins. Co. v. *Clanton*, ... N. J. Eq. (Vice-Chancellor Emery) 4.

II.

The beneficiary of a life insurance policy can be changed only in accordance with the terms of the policy and not otherwise.

Equitable Life Ass. Soc. v. *Stilley*, 271 Ill. App. 283, 285.

McEdowney v. *Met. Life Ins. Co.*, 347 Ill. 66.

Freund v. *Freund*, 218 Ill. 189, 190.
Begley v. *Miller*, 137 Ill. App. 278.
Metropolitan Life Insurance Co. v. *Tesauro*, 94 N. J. Eq. 637.
Metropolitan Life Insurance Co. v. *Zgliczenski*, 94 N. J. Eq. 300.

III.

The employer of the insured is his agent in a group life insurance policy.

Met. Life Ins. Co. v. *Quilty*, 92 Fed. (2nd) 829.
Boseman v. *Conn. Gen. Life Ins. Co.*, 301 U. S. 196.

IV.

The requirements for the change of beneficiary are for the protection of the insured and cannot be waived by insurer.

Sun Life Assurance Co. v. *Williams*, 284 Ill. App. 222, at 225 (distinguished).
Equitable Life Ins. Co. v. *Stilley*, 271 Ill. App. 283, at 285 (sustaining our view).
Freund v. *Freund*, 218 Ill. 189, at 190 (leading case in Illinois).

V.

St. Clark Moore was subjected to undue influence when he signed changes of beneficiary (which was raised by affirmative answer (Tr. 41). (See Argument.)

ARGUMENT.

I.

The proceeds of a life insurance policy vest in the beneficiary named therein at the time of the death of insured.

The proceeds of a life insurance policy vests in the beneficiary at the time of the death of insured. This does not mean before death, nor after death. It vests—and all rights are determined—at the moment of death.

That is true of a will. It is true of any legal situation which depends upon the death of the key party to bring it to pass. If a man dies a minute before his wife, she is his heir; if he dies a minute after, he inherits from her. The whole chain of descent is changed by a single minute.

The law is fixed and clear.

In the case of *Prudential Insurance Company of America* v. *Fidelity Union Trust Company, as executor of the last will and testament of Robert Gemmell, deceased*, v. *Armena B. Gemmell, et al., defendants*, 102 New Jersey Equity 281, the insured held a group life insurance policy in which his mother was named as beneficiary with the identical change of beneficiary clause. In his life time he made application for disability benefits under the policy. The application was approved and a check was drawn to his order for $10,074.80. He died before the delivery of the check to him and the executor of his estate claimed the money on the theory that the amount thereof was due the insured before his death; that the issuance of the check to the insured be-

fore his death converted the policy into cash and the cash belonged to his assets and therefore to his estate. The mother claimed the money as beneficiary named in under the policies and the Court held that the beneficiary under the policy could not be divested of her rights. On pages 285 and 286 the Court said:

> "The company bound itself to pay, not to agree to pay. It never did pay, and the transaction was not completed. Again Mrs. Gemmell could only be divested of her right under the policy by the manner required b the policy."
>
> "Where a contract of insurance is made payable to designated beneficiaries, and prescribes a procedure for divesting their interest, in favor of another beneficiary, such interest can be divested, in the absence of an assignment by the beneficiaries themselves, only by following the procedure so prescribed."
>
> "Whether the interest (of the beneficiary) be regarded as vested or defeasible, contingent, a mere expectancy, or whatever the characterization may be, if the policy stipulates the course by which the beneficiary's interest is to be nullified, he cannot be deprived of his right, unless the prescribed mode for its destruction is followed."

In the State of Illinois, the Supreme Court has passed upon this question with finality. In *Gurnett* v. *Mutual Life Ins. Co.*, 356 Ill. 612, at 619, the Court held:

> "The date of the death of the insured merely fixed the time when the obligation of the insurers to pay and the right of the beneficiary to receive the proceeds of the policies became enforceable."

This case cited as authority *Frick* v. *Lewellyn*, 298 Fed. 803.

We believe it is necessary to cite only one other case supporting this well known and fixed rule of law. In *Equi-*

table Life Ass. Soc. v. *Stilley,* 271 Ill. App. 283, the Appellate Court of Illinois, relying upon the Supreme Court, has this to say (p. 285):

> "The right of the insured to change the beneficiary was dependent upon the terms of the policy. Here the requirement was that 'such change shall take effect only upon its indorsement on this policy by the Society.' By the terms of the contract, the change could only be accomplished by compliance with such provision, and until the indorsement was actually made, there was no change. The insured died before the insurer made the final indorsement of change of beneficiary on the policy; hence there was no change in the lifetime of the insured and at his death the rights of Mary Elizabeth Stilley, the originally named beneficiary, became vested, and were not affected by subsequent indorsement.' " (*Freund* v. *Freund,* 218 Ill. 189; *McEldowney* v. *Met. Ins. Co., supra.*) (Italics ours.)

In short, that is exactly what happened in the instant case. The wife, Julia Moore, was the beneficiary. The attempted change of beneficiary was not recorded by the Company until a day after the death of insured.

Under cases cited above the proceeds became vested in beneficiary named in the policy on the date of insured's death. Under these cases the change of beneficiary was not effected when the Company had certified to the fact. That was not a requirement of the policy itself (Tr. 23). The requirements of the policy were even stronger than that. This policy went further than the requirement of "endorsement", as we shall show in our next point. It required acknowledgment be furnished the insured before the change of beneficiary was effected and the rights of Julia Moore would cease. This was never done or attempted.

Clearly, then, the beneficiary was not changed. The original beneficiary, Julia Moore is alone entitled to the proceeds of the policies.

II.

The beneficiary of a life insurance policy can be changed only in accordance with the terms of the policy and not otherwise.

The policy in issue states on the face:

> "The beneficiary may be changed in accordance with the terms of the policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the employer. Such change shall take effect after the acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former beneficiary or beneficiaries shall thereupon cease" (Tr. 23).

We suggest that the statement regarding the change of beneficiary above set forth has three significant parts:

1. It sets forth in the first sentence the steps which the insured must take to effect a change; and
2. It sets forth what steps the Company must take to effect a change.
3. It determines when the rights of the former beneficiary ceases.

In this case the insurance company did not attempt to perform the requirements of the change of beneficiary clause. It did not attempt to serve the acknowledgment on the insured.

In *Equitable Ins. Ass. Soc.* v. *Stilley*, 271 Ill. App. 283, the Appellate Court of Illinois, relying upon the Supreme Court has, this to say (p. 285):

> "The right of the insured to change the beneficiary was dependent upon the terms of the policy. Here the requirement was that 'such change shall take effect only upon its indorsement on this policy by the Society.' By the terms of the contract, the change could only be accomplished by compliance with such provision, and until the indorsement was actually made, there was no change."

In *Freund* v. *Freund*, 218 Ill. (Supreme) 189, at 190, the Court said:

> "This (requirement of indorsement) is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid, and should not be enforced as made. * * * the company never did give its consent to the change in beneficiary * * * as attempted to be made * * * and that the company never did make the indorsement, required by the contract, upon the policy, at its some office or any other place. Therefore, the change did not take place."

The *Freund* case has been sustained by the later case of *McEldowney* v. *Metropolitan Ins. Co.*, 347 Ill. 66 at 69, where the Court said:

> "The question as to when such change can be said to have been accomplished was given thorough consideration by this Court in *Freund* v. *Freund*, 218 Ill. 189, a case which has been cited and followed in many other jurisdictions * * * There we said. 'This is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid and should not be enforced as made. * * * It cannot be said that the mere signing of the written notice at the branch office accomplished the change.' "

The *Freund* case and the case at bar are similar. In the *Freund* case the policy provides that the change of beneficiary shall not take effect until indorsed on the policy by the company at the home office. In the case at bar the

policy provides that the change of beneficiary shall not take effect until the acknowledgment is furnished the insured. In the *Freund* case the consent was not attached to the policy, and in this case the acknowledgment was not furnished, to the insured.

New Jersey Courts uphold the rule of law established by the Supreme Court of Illinois in the *Freund* case.

In *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 22, Mr. Justice McSurley based his opinion on the decision of the Supreme Court of New York in the case of *White* v. *White*, 194 New York Supp. 114, in which the facts were identical with the facts in the *Williams* case and in comment thereon said:

> "An examination of decisions in New York indicates a similar divergence of views from that expressed in the *Freund* case. *White* v. *White*, 194 N. Y. S. 114, involved facts like those in the instant case. There the insured on August 30, 1921, signed a request for change of beneficiary; he died on the same day; the request reached the office of the insurance company one or two days thereafter; the policy contained a provision that a change of beneficiary shall take effect upon the endorsement of such redesignation of beneficiary upon the policy, 'and not before,'—a provision substantially the same as the New York statute."

The *White* case is quoted from by the Court for the reason that the decision in the *Freund* case was based upon a provision of the New York Statute, and the Appellate Court of Illinois decided that it was justified in making the *Williams* case, an exception to the *Freund* case after New York did so in the *White* case.

The ruling of the reviewing Court of New York in the *White* case, was the foundation of the *Sun Life Assurance* case, and this court having declared that it will follow Illi-

nois decisions unhesitatingly, should accept the law of the State of New Jersey where the Prudential Insurance Company of America is domiciled and incorporated as the keystone of its decision in the absence of any decision by an Illinois Court to the contrary.

In New Jersey the courts in passing upon appeals taken in cases where the insurance policies contained the same change of beneficiary clause, contained in the Sun Life Insurance policies and the Metropolitan Life Insurance policies, made the same ruling that the Supreme Court of Illinois made in the case of *Freund* v. *Freund*, 218 Ill. 189.

In the case of *Metropolitan Life Insurance Company* v. *Tesauro*, 94 N. J. Eq. 637, where the insured sought to change the beneficiary from his mother to his wife but failed to do so in accordance with the terms of the contract in that he did not send the policy to the insurer. The Court in holding that no change had been effected said:

> "The law is that a change of beneficiary can only be effected in the manner provided by the policy for such change. * * * There is no doubt that the insured intended to make the change, but as a written notice to that effect was not delivered to the home office of the insurance company accompanied by the policy for suitable indorsement and as the change of beneficiary was not indorsed upon the policy, the beneficiary named—the mother— was not divested of her interest."

To the same effect is the case of *Metropolitan Life Insurance Company* v. *Zgliczenski*, 94 N. J. Eq. 300. In that case the Court said, "It is well settled in this state, in cases of this kind, that in order to effect a change of beneficiary or an assignment of the policy, or any part thereof, the terms and conditions upheld by the policy to accompany those ends must be strictly complied with."

The Court referred to other cases and was emphatic in holding that an uncompleted change of beneficiary does not divest the original beneficiary of her right to the proceeds of the policy and that the procedure for divesting the interest of a beneficiary in favor of another beneficiary can only be accomplished by following the procedure prescribed in the policy and was not destroyed unless the prescribed mode of its destruction is followed.

New Jersey law is the foundation of this case, just as New York law is the foundation of the *Sun Life Assurance* case and the *Thompson* case and all cases, based upon the same contract.

> "Certainly some sort of a title thereto was in the petitioner and whatever that title was, she could be divested of it only by a strict compliance with the conditions of the contract as therein provided, or by some act or proceeding to which petitioner was a party so that she would be bound thereby."

This positive law is conclusive proof that the policy on the life of St. Clark Moore was never changed in accordance with the terms of the policy itself, nor in accordance with the law as established in this jurisdiction.

III.

The employer of the insured is his agent in a group life insurance policy.

Ionia Moore rested her case upon the proof that the request for a change of beneficiary was delivered to the employer of St. Clark Moore. The employer of the Insured was not the agent of the Insurer and delivery of the authorization to change the beneficiary to the employer was not an acknowledgment by the Insurer that the beneficiary was changed.

In *Metropolitan Life Insurance Company* v. *Quilty*, 92 Fed. (2d) 829, suit was brought on a group policy, as was done in the case at bar. It was there contended, as it is contended here, that notice to the employer was sufficient as it was the agent of the insurance company.

The court held that in procuring group insurance and in doing generally whatever may serve to obtain and preserve the insurance, including giving notice of death or disability, which gives rise to the liability on the policy, the employer acts as the employee's agent and for itself and not as the insurance company's agent.

In *Boseman* v. *Connecticut General Life Insurance Company*, 301 U. S. 196, the Court said:

> "When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums, and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as the agent of the insurer but for their employees or for themselves."

The record is silent as to the date, the Pullman Company delivered the request for the change to the insurance company, it may have been held by the Pullman Company until St. Clark Moore died to prevent St. Clark Moore and Julia Moore from learning that it had been signed. It would be consistent with the other acts of the conniving relatives of Ionia Moore, if the Pullman Company held the signed requests until St. Clark died and then sent them to plaintiff. Had it been to her advantage, Ionia Moore would have made proof of the date they were sent to the insurance company if delivery was made before his death.

Had the insurance company delivered the acknowledgment to the Pullman Company, Ionia Moore would argue,

that the acknowledgment need not be delivered before the death of the insured, but could have been delivered after the death of the insured to the agent of the insured.

IV.

The requirements for the change of beneficiary are for the protection of the insured and cannot be waived by insurer.

Ionia Moore contended in the trial Court that the requirement of the policy, that the acknowledgment be served upon the insured before the rights of appellant, Julia Moore shall cease, is for the benefit of the insurance company and was waived by the plaintiff when the acknowledgment was executed by plaintiff. Defendant relies upon the case of *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 222, in which case it was held that the consent by the insurer to the change of beneficiary could be given after the death of the insured. Although the change of beneficiary in that policy and the change of beneficiary in the instant case are not similar and involve an entirely different act, the trial Court followed this case, in its conclusion of law and the Court of Appeals likewise.

In our case the insurance company is required to deliver the acknowledgment to the insured, the acknowledgment need not be attached to the policy, and it is immaterial whether the insurance company has the policy in its possession when the acknowledgment is executed. It is mandatory, however, that the acknowledgment be delivered to the insured before the change of beneficiary takes effect.

In the case cited, the Sun Assurance Co. was not required to deliver the consent to the change of beneficiary to the insured. It was only required to attach the consent to

the policy, which was done, and the point of law involved, was whether the consent could be attached to the policy after the death of the insured.

The Appellate Court of Illinois held that the requirement of the policy that the company give its consent before the change of beneficiary became effective, was for the protection of the company, and could be waived by the company, and the execution by the company, of the consent after the death of the insured, was a waiver by the company of its right to refuse to consent to the change of beneficiary. The distinction between the two cases is, that the change of beneficiary became effective when the Sun Life Assurance Co. consented to the change of beneficiary and in the case at bar the change of beneficiary became effective when the acknowledgment was delivered to St. Clark Moore.

The decision of the Appellate Court in the case of *Sun Life Assurance Company* v. *Williams* is no more binding, and much less persuasive, than *Equitable Life* v. *Stilley*, 271 Ill. App. 283, cited hereinbefore.

In the case of *Sun Life Assurance Company* v. *Williams*, 284 Ill. App. 22, declared by this Court to be the ruling case, the Appellate Court of Illinois, held that it did not apply the law as announced in the *Freund* case, but distinguished the case before it from that case, for the reason that in the *Freund* case, the insurance company did not attach, a consent to the change of beneficiary, to the policy. If the Court followed the reasoning of the Appellate Court in the *Williams* case it would necessarily hold, that the plaintiff in this case, did not deliver the acknowledgment to the insured as the policy provides, and therefore the change of beneficiary was not completed, and the *Freund* case is control-

ing. The *Williams* case was made an exception to the rule of law, laid down by the Supreme Court in the *Freund* case, for the reason that the insurance company attached a consent to the policy, and did not do so in the *Freund* case.

In our own case the relatives of Ionia Moore had the request for the change four days before the death of St. Clark Moore and did not explain why it was not delivered to plaintiff before his death.

Ionia Moore does not contend that the acknowledgment was delivered to anyone for St. Clark Moore. As a matter of fact the acknowledgment was still in the possession of the Prudential Insurance Company when the case was tried. The attorney for plaintiff produced the policy and the acknowledgment on the witness stand, and it is therefore apparent that no attempt was made by the insurance company to deliver the acknowledgment to St. Clark Moore, or to his agent, which would be the Pullman Company, employer of St. Clark Moore, in accordance with the explicit required terms of the policy.

The burden is on Ionia Moore, to explain why the acknowledgment was not made and delivered to the insured as the contract provides, and Ionia Moore has not explained why such acknowledgment was not made and delivered in the four days that elapsed between the execution and the death of the insured.

Ample opportunity was given plaintiff to perform the contract in the lifetime of St. Clark Moore. In the *Sun Insurance Co.* case, Justice McSurley (on page 225) declared that time was the essence of the change:

> "An examination of decisions in New York indicates a similar divergence of views from that expressed in the *Freund* case. *White* v. *White,* 194 N. Y. A. 111, in-

> volved facts like these in the instant case. There the insured on August 20, 1921, signed a request for a change of beneficiary; he died on the same day; the request reached the office of the insurance company one or two days thereafter; * * *"

Julia Moore cannot be deprived of her rights by reason of the failure of plaintiff to perform the plain terms of the contract.

Plaintiff erred in not making the acknowledgment and delivering the same to the insured in his lifetime and such error cannot be excused, or waived by plaintiff, or anyone else, after the rights of Julia Moore have attached.

V.

St. Clark Moore was subjected to undue influence when he signed change of beneficiary.

The signature of St. Clark Moore to the change of beneficiary was obtained by relatives of the mother through undue influence by relatives of the mother, while the wife was under detention by the police. Their plan was simplified by the delirious condition of St. Clark Moore, who was mentally incompetent and unable to understand their actions.

Roberta Wigington, niece of respondent, set the machinery in motion to change the beneficiary before she talked to St. Clark. She ordered the Pullman Company to send a representative to obtain the signature of St. Clark Moore before she talked to him on August 7th. She ascertained how the beneficiary could be changed by consulting an attorney, who filed a sworn answer, in which he stated that the relatives informed him that Julia Moore instituted claims for the insurance and that the relatives expressed great concern and fear that Julia Moore would collect the

insurance in case of the death of the insured. (All of which was ridiculous because Julia Moore was not at liberty, Record 23). The affidavit also said that said attorney advised the relatives how to proceed to have the beneficiary changed on August 9, 1942. It is most significant that all of the preparations for the change of beneficiary were made by the relatives of Ionia Moore outside of the presence of St. Clark Moore, who was not physically and mentally able to transact business.

The preparations for the change of beneficiary were made on August 7 and Dr. Diggs, a witness for Ionia Moore testified that he was operated upon August 7. The police officer testified that he was unconscious on August 7, 1942. Dr. Clemons testified that at 9:30 o'clock in the morning of August 10, 1942, St. Clark Moore was unable to talk; that he was delirious. He said that he told St. Clark Moore, this is Dr. Clemons, but he did not recognize him. It is reasonable to assume that the testimony of Dr. Clemons is more dependable than the testimony of Dr. Diggs because Dr. Clemons is disinterested in the outcome of the case, Dr. Diggs entered into a conspiracy with the relatives of Ionia Moore, to prevent Julia Moore from seeing her husband before his death, for the purpose of preventing Julia Moore from ascertaining that St. Clark Moore had signed a change of beneficiary, Dr. Diggs is not a disinterested person, he had a claim for $200.00 for performing an operation that resulted in the death of St. Clark Moore and the collection of his claim is dependent upon the success of Ionia Moore in collecting the insurance. He pretended that he tried to save the life of St. Clark Moore, he knew that the success of his efforts depended upon the desire of St. Clark to live, yet he refused to allow Julia Moore to see her husband, although her presence may have aroused him from his lethargy and given him the incentive to fight to live because of his love for her.

The conduct of the relatives of Ionia Moore indicates that they were more interested in the death of St. Clark Moore than they were in the life of St. Clark Moore. They did not donate any blood to save his life and they kept the one person away from him that may have given him the incentive to fight to live. Their attitude is clearly described by the statement of the cousin who said she would rather see him die than to let his wife see him. When the remark was made the wife did not know the significance of it, because she did not know that a change of beneficiary had been executed by him on the same day, and it is reasonable to infer that after having obtained a change of beneficiary, the relatives wished for the death of St. Clark Moore, so that the insurance could be collected by Ionia Moore.

The relatives did not want St. Clark Moore to know the purport of the document, signed by him on August 10, 1942, and in order to prevent him from learning that he had signed a change of beneficiary barred Julia Moore from the hospital and had the change of beneficiary held, and not delivered to the home office of the insurance company, until the day following the death of St. Clark Moore. Mr. Leary testified that he did not know St. Clark Moore, that he went to the hospital and Roberta Wigington met him outside of the door of the ward and took him to the bed of St. Clark Moore where a blank card was signed, that the transaction took place in a short length of time and that he gave the card to the chief clerk in the office of the Pullman Company on the same day.

Roberta Wigington is the same person who knew Dr .Diggs and who barred Julia Moore from seeing her husband. She is the leader of the conspiracy to obtain a change of beneficiary. She consulted an attorney and arranged for the visit of Mr. Leary to the hospital.

Conclusion

This is a strange case, Julia Moore is crucified on a cross of suspicion while she was languishing in a police cell waiting until she was exonerated from all suspicion, she was cheated out of her inheritance by scheming and designing relatives of her mother-in-law. She was denied the one chance she had of exonerating her name when the Court denied witness who talked to her husband immediately after the shooting, which was the only time he was able to talk coherently (Tr. 89, 90).

But more fundamental is the fact also that she was denied her rightful inheritance by a spurious change of beneficiary which the law does not countenance. Julia Moore was the decedent's wife and his designated beneficiary. The beneficiary could be changed only in accordance with the law governing same. The law of Illinois and New Jersey required that the change of beneficiary be completed in accordance with the terms of the policy and in the lifetime of the decedent. Neither was done.

Whatever appellee may argue will not circumvent the facts (1) that the change of beneficiary was not completed in the lifetime of decedent and (2) that the insured never did receive "notice of the change" as required by the specific terms of the insurance contract.

If the requirement of "notice to insured" meant nothing, why, then, was it in the contract? Insurance contracts are public contracts approved by the law of the state where it is issued. Why would the requirement of notice be put in the policy and approved by the state if it meant nothing? This clause would be binding in a totally private contract. How can anyone avoid it in a contract where the public policy of the state approves it through its laws?

This is purely a question of law and order—the law of contracts, and the order of society. We respectfully repeat that Julia Moore was the wife and the named beneficiary. Her designation as beneficiary was never changed. The proceeds of the policy rightfully belong to her. Nothing in another trial can alter the fundamental facts in issue. We therefore, believe that the decree of the trial Court should be reversed and that the decretal order should be retried in this Court awarding the proceeds of the policies in issue to Julia Moore, appellant.

Respectfully submitted,

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel,

Chicago, Illinois,
January 20, 1945.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 8578. October Term and Session, 1944.

The Prudential Insurance Company of America, a Corporation,
Plaintiff,
vs.
Julia Moore, Ionia Moore, Richard E. Westbrooks, doing business as Ellis & Westbrooks and Dr. N. Alfred Diggs,
Defendants.

Julia Moore,
Defendant-Appellant,
vs.
Ionia Moore,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 13, 1944.

Before Evans, Major, and Kerner, Circuit Judges.

Evans, Circuit Judge. This appeal is from a judgment which awarded appellee, Ionia Moore, the amount recoverable on two insurance policies written on the life of St. Clark Moore, who died August 14, 1942. The insurance

company instituted this suit. It admitted liability on both policies and sought a judicial determination of which one of two claimants should receive the money. These two claimants were the widow of the insured, the appellant herein, who was named as beneficiary in both policies, and the mother of the insured, who bases her claim on an asserted change in the beneficiary made a few days before the insured died. The controverted issue is therefore restricted to an inquiry into the validity of the asserted change in beneficiary.

The District Court found that there was a valid, effective change of beneficiary made August 10th, 1942.

The Facts. The insured held two policies in the Prudential Insurance Company, which were taken out June 18, 1942, through the Pullman Company, for which insured worked. He designated his wife, Julia, as beneficiary in both policies. He was shot by said Julia on August 6, 1942, and as a result thereof he died eight days later, on August 14, 1942. Appellant claims that her shooting of her husband was accidental. However, insured sought to change the beneficiary immediately thereafter. On August 10th, he signed the necessary application, aided by a representative of the Pullman Company, and sent it to the insurance company, which in turn made a certificate noting the change of beneficiary, which certificate bore date August 15, 1942—one day subsequent to the death of the insured. The certificate and the policy were retained by the company.

It is thus apparent that our determination of this appeal turns upon our answer to the query,—Did the insured change his beneficiary before he died?

Appellant argues that he did not, and advances three

reasons: (1) Undue influence had been brought to bear upon insured which caused him to make the attempted change. (2) The insured was of unsound mind at the time he executed the application for a change of beneficiary, and the signature was not his. (3) No certificate of change of beneficiary had been furnished by the insurance company before insured's death—a policy requirement to a valid change of beneficiary.

On the two factual issues,—undue influence and mental incapacity, the court, a jury having been waived, found that the signatures on the applications were those of the insured; that he was competent to make the change, and in the full possession of all his faculties; that he was under no duress or undue influence and "the act of making the change of beneficiary was deliberate and of his own volition."

It would be of no particular benefit to review all the testimony upon which these findings were made. The appellant stated that her husband realized and stated that her shooting of him was accidental, and that he retained his great affection for her, in spite of the careless gun play but was overpersuaded by others while he lay in the hospital, sick, weak, and delirious.

The extent of the conflict in the testimony is shown by the testimony of two doctors. One said:

"Q. Did you see St. Clark Moore on August 10 when you got there?

"A. I did.

"Q. Did you talk to him?

"A. No, he was delirious; he was unable to talk.

"Q. What did you say to him?

"A. I told him—I said, 'This is your doctor, Dr. Clemons.' He didn't recognize me."